

Action and Reaction

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If the Democrats win the Presidential elections in the US and the majority in both houses, the possibility will emerge to address a question which is particularly close to the constitutionalist's heart: what to do about the Supreme Court?

The Court has been the object of a right-wing takeover project for more than three decades, and unless something unforeseen happens, this project will finally be accomplished under the presidency of Donald Trump. If he and the Republicans in the Senate manage to fill the post of the late Justice Ruth Bader Ginsburg in time, six of the nine seats on the bench will be filled with what we have gotten used to call "conservatives". The spurious hope that Chief Justice John Roberts might turn himself into a swing vote between the conservative and liberal parts of the bench in the mold of Anthony Kennedy, will completely evaporate. The Court will be firmly embedded in a large-scale right-wing project to immunize the dominance of white rich men for the foreseeable future against the culturally and demographically ever more inevitable defeat at the ballot box.

In the event of an election victory in November, would the Democrats simply have to accept that state of affairs? The discussion about packing the Court to reverse the majority shift has been [going on](#) for [some time](#), but has now gained considerable momentum. At first glance, this idea bears a frightening likeness to what authoritarian regimes like to do to their independent judiciary: moving the needle of the majority balance on the court by filling the bench with new people of their own choosing. The sitting judges cannot be fired, but their number can be increased to an extent necessary to open enough new posts to be filled with obedient loyalists to make any possible resistance from the court futile. It is the power of the legislature to do this (by the way, [in Germany, too](#)). This is what Erdoğan did, this is what Orbán did, this is what Kaczyński did. Now also Biden?

On the other hand, it is by no means always and in every case a bad thing and hurtful to democracy and the rule of law when the political majority decides to take on the judiciary. Few will dispute the fact that the constitutional courts of, say, Venezuela or Poland in their current composure must not exist a minute longer than the power reality in these countries compels. When a court is compromised and corrupted to a point that it can no longer claim any respect for its judgments except from those who benefit from them in the first place, then it is, in the interest of the rule of law, not just forgivable for the political majority to set about repairing this state of affairs, but downright necessary.

What corrupts these courts is not the political effects and motives of their judgments. The problem is not that they are veering too much to the right (or left). The problem isn't even necessarily the personal integrity of the judges. The problem is that a court that allows itself to be turned into a tool of a particular political party won't properly function as a court for much longer. It can hardly expect plaintiffs and defendants

to accept its verdict even if they are defeated. It becomes a hollow, embarrassing, painted papier-mâché caricature of itself, despised by all and not least of all by its own political masters.

It is no secret that the U.S. Supreme Court has handed down many rulings implementing right-wing policies, poking [holes into the right to abortion](#), striking down [gun regulations](#). Which I find very regrettable, of course, but in itself a rather weak argument for liberal court packing. But there is another set of judgments to complete the picture, which are not so much about politically contested issues, but about the democratic playing field itself. This very playing field has been tilted in the favor of the Republicans by the Republican-nominated majority in the Supreme Court time and again, when it came to [campaign financing](#), when it came to [gerrymandering](#), when it came to [voter restriction](#), when it came to whether or not [George W. Bush actually had won the election](#). Again and again. For years.

Conversely, the Supreme Court itself, like the federal courts in general, has in recent years become the target of right-wing takeover policies to an extent that cannot be left unchallenged – starting with the blocking of every judicial nomination of President Obama, regardless of person and policy, which unfortunately provoked the Democrats in 2013 to lower the quorum necessary for the election of federal judges in the Senate to 50%. Then, of course, the refusal of the Republican Senate majority in 2016 to grant Obama's candidate Merrick Garland even a hearing, thus stealing from Obama the right to choose a nominee and handing it to Trump instead. Finally, the abolition of the Senate minority's voice in the election of Supreme Court judges on the occasion of the election of Neil Gorsuch in 2017. If we add the Republicans' judicial policy at the [state level](#), we get the full picture: In Arizona and Georgia, Republicans have indeed successfully packed the State Supreme Courts to turn the majority balance in their favor, and in several further states they have tried.

There is no equivalent on the Democrat side to this. This is not the usual political game in which one side tries to win against the other and vice versa. Here, one side tries to manipulate the rules of the game in its own favor and at the expense of the other, and only one side, for many years, openly and bluntly, while the other side looked on helplessly and with ever increasing panic as the constitutional fabric of the democratic state under the rule of law was torn to shreds one judicial nomination at a time.

With their acknowledgement that they will elect RBG's successor weeks before the election when they had refused Garland a hearing months before the election, the Senate Republicans have renounced any pretense of what their true aim is: turning the Supreme Court into their tool. The ultimate proof that they have achieved that aim would be delivered by the Court if it stops the counting of postal-vote ballots in November or December and thus hands victory to Trump even while everyone knows that he has in all likelihood lost. An outcome which would, of course, also put an end to all dreams of liberal court packing for a long time to come.

If, on the other hand, the Democrats win in November, it will probably take a landslide – one that will bury the entire Republican establishment ten feet deep.

Then a new situation will arise. Many things that seem unimaginable today will then become conceivable.

This week on Verfassungsblog

... together with the German Bar Association we have launched a new podcast entitled **We need to talk about the Rule of Law**, which we discuss in a total of 12 episodes different aspects of the rule of law crisis in Europe every Wednesday with European guests from various countries. In the [first episode, the focus was on Constitutional Courts](#). They are under fire in many countries, not only in Poland, but also e.g. in Spain, which is why I was particularly thrilled to be able to discuss this with two former (vice-)presidents of Constitutional Courts, namely STANISLAW BIERNAT and PEDRO CRUZ VILLALÓN. My third guest was MICHAELA HAILBRONNER, expert on the German Constitutional Court and well known to all Verfassungsblog readers. Unfortunately we had some sound issues, but the content is very much worth listening to.

The EU Commission has published its **asylum package**, which is supposed to fix the weaknesses of the Dublin system – but doesn't, really. [DANIEL THYM](#) examines the central contents of the reform package and comes to the conclusion that, for all the solemn words, it leaves much to be desired. Meanwhile, the British government has chosen to adopt the "Australian solution" of preventing boats with fugitives from reaching England's shores through a mixture of "pushback" and "pullback" strategies. This is hardly compatible with international refugee, human and maritime law, as [EMILIE McDONELL](#) demonstrates.

Waldemar #urek and Monika Fr#ckowiak are the names of two **Polish judges** whom I don't hesitate to call heroes, for all the distress they have been suffering at the hand of the PiS government and their disciplinary henchmen. This week, their cases were heard before the ECJ. [JOHN MORIJN](#) was on site and reports on the lessons he learned from listening to the Polish government representative.

The **Sharpston affair** at the ECJ has caused the most heated discussions on Verfassungsblog for a long time, and now [CARL BAUDENBACHER](#), the former president of the EFTA Court, has intervened: Unlike many other authors, however, he asks not whether the suspension of the term of office of the Advocate General was generally lawful, but whether her exclusion from the European Court of Justice is compatible with EU law, with a view to a case of the EFTA Court from 2016.

A **vaccine against Covid-19** does not yet exist, but once it does it will trigger difficult distribution issues. [ANIKA KLAFKI](#) gives a legal overview of the questions that the government should ask itself before deciding on prioritizing access to the vaccine.

How can legal protection against **unlawful police operations** be effectively provided? Administrative court injunctions usually come too late and the processing of illegal police operations before criminal courts does not function structurally. [DAVID WERDERMANN](#) comments on a recent ruling by the Regional Court of Cologne.

In **Indonesia** the government is turning the popular Anti-Corruption Commission into a toothless tiger, as [MULKI SHADER and ABDURRACHMAN SATRIO](#) criticize.

That's it for this week again. All the best and take care, and please don't forget to support us via [Steady](#) or send us (paypal@verfassungsblog.de) the sum you deem appropriate for our work this week. Many thanks!

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